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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 153 and 157

[Docket No. RM20-15-002; Order No. 871-C]

Limiting Authorizations to Proceed with Construction Activities Pending Rehearing

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order addressing arguments raised on rehearing and clarification.

SUMMARY: The Federal Energy Regulatory Commission addresses requests for rehearing and clarification of Order No. 871-B.

DATES: The effective date of the document published on May 13, 2021 (86 FR 26,150), is confirmed: June 14, 2021.

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1. On May 4, 2021, the Federal Energy Regulatory Commission (Commission) issued an order addressing arguments raised on rehearing and clarification, and setting aside, in part, its prior Order No. 871.¹ Order No. 871-B revised the rule previously adopted by the Commission in Order No. 871² to narrow the scope of its application and to incorporate a time limitation for the Commission to preclude issuances of authorizations to proceed with construction activities. Order No. 871-B also announced a new general policy of presumptively staying certificate orders issued pursuant to section 7(c) of the Natural Gas Act (NGA)³ during the 30-day rehearing period and pending Commission resolution of any timely requests for rehearing filed by landowners. On June 3, 2021, the Interstate Natural Gas Association of America (INGAA), the Enbridge Gas Pipelines (Enbridge),⁴ and Mountain Valley Pipeline, LLC (Mountain Valley) requested clarification and rehearing of Order No. 871-B.

¹ *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871-B, 86 FR 26150 (May 13, 2021), 175 FERC ¶ 61,098 (2021).

² The Commission issued its June 9, 2020 Order No. 871 to preclude the issuance of authorizations to proceed with construction activities with respect to orders granting authorizations under sections 3 and 7 of the Natural Gas Act (NGA) until the Commission acts on the merits of any timely-filed request for rehearing or until the deadline for filing a timely request for rehearing has passed with no such request being filed. *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 85 FR 40113 (Jul. 06, 2020), 171 FERC ¶ 61,201 (2020).

³ 15 U.S.C. 717f(c).

⁴ The Enbridge Gas Pipelines include Algonquin Gas Transmission, LLC; Big Sandy Pipeline, LLC; Bobcat Gas Storage; East Tennessee Natural Gas, LLC; Garden Banks Gas Pipeline, LLC, Market Hub Partners Holding, LLC; Mississippi Canyon Gas Pipeline, LLC; Saltville Gas Storage Company L.L.C.; and Texas Eastern Transmission, LP. The Enbridge Gas Pipelines also include natural gas companies in which affiliates of the Enbridge Gas Pipelines own a joint venture interest, including Alliance Pipeline L.P., Gulfstream Natural Gas System, L.L.C.; Maritimes & Northeast Pipeline, L.L.C.; Nautilus Pipeline Company, L.L.C., NEXUS Gas Transmission, LLC; Sabal Trail Transmission, LLC; Southeast Supply Header, LLC; and Steckman Ridge, LP.

2. Pursuant to *Allegheny Defense Project v. FERC*,⁵ the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 19(a) of the NGA,⁶ we are modifying the discussion in Order No. 871-B and continue to reach the same result in this proceeding, as discussed below.⁷

I. Background

3. In Order No. 871, the Commission explained that historically, due to the complex nature of the matters raised on rehearing of orders granting authorizations under NGA sections 3 and 7, the Commission had often issued an order (known as a tolling order) by the thirtieth day following the filing of a rehearing request, allowing itself additional time to provide thoughtful, well-considered attention to the issues raised on rehearing.

4. In order to balance its commitment to expeditiously responding to parties' concerns in comprehensive orders on rehearing and the serious concerns posed by the possibility of construction proceeding prior to the completion of agency review, the Commission, in Order No. 871, exercised its discretion by amending its regulations to add new § 157.23, which precludes the issuance of authorizations to proceed with construction of projects authorized under NGA sections 3 and 7 during the period for filing requests for rehearing of the initial orders or while rehearing is pending.⁸

⁵ 964 F.3d 1 (D.C. Cir. 2020) (en banc) (*Allegheny*).

⁶ 15 U.S.C. 717r(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁷ *Allegheny*, 964 F.3d at 16-17. The Commission is not changing the outcome of Order No. 871-B. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁸ Order No. 871 also revised § 153.4 (general requirements for NGA section 3

5. Three weeks after the Commission issued Order No. 871, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an *en banc* decision in *Allegheny*.⁹ The court held that the Commission's use of tolling orders solely to allow itself additional time to consider an application for rehearing does not preclude operation of the NGA's deemed denial provision,¹⁰ which enables a rehearing applicant to seek judicial review after thirty days of agency inaction.¹¹ The court explained that, to prevent an application for rehearing from being deemed denied, the Commission must act on an application for rehearing within thirty days of its filing by taking one of the four NGA-enumerated actions: grant rehearing, deny rehearing, or abrogate or modify its order without further hearing.¹²

6. Shortly thereafter, on July 9, 2020, the Commission received three timely requests for clarification and rehearing of Order No. 871. To facilitate reconsideration of Order No. 871 and ensure a complete record for further action, the Commission in Order No. 871-A subsequently provided interested parties an opportunity to comment on the arguments raised on rehearing and specific questions posed by the Commission.¹³ In response, the Commission received twelve initial briefs and five reply briefs from a

applications) of the Commission's regulations to incorporate a cross-reference to § 157.23.

⁹ 964 F.3d 1.

¹⁰ 15 U.S.C. 717r(a).

¹¹ *Allegheny*, 964 F.3d at 18-19.

¹² *See id.* at 13 (quoting 15 U.S.C. 717r(a)).

¹³ *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871-A, 86 FR 7643 (Feb. 1, 2021), 174 FERC ¶ 61,050 (2021).

variety of stakeholders, including states, landowners, natural gas companies, and a consortium of public interest organizations.¹⁴

7. In consideration of the arguments raised on rehearing and in the briefs, the Commission in Order No. 871-B revised § 157.23 of its regulations to provide that the rule prohibiting the issuance of construction authorizations pending rehearing will apply only when a request for rehearing raises issues reflecting opposition to project construction, operation, or need.¹⁵ Order No. 871-B further revised the rule to provide that the rule's restriction on issuing construction authorizations while a qualifying rehearing request remains pending will expire 90 days following the date that such request may be deemed denied by operation of law under NGA section 19(a).¹⁶

8. In addition, the Commission in Order No. 871-B announced its intent to stay its NGA section 7(c) certificate orders during the 30-day rehearing period and pending Commission resolution of any timely requests for rehearing filed by landowners.¹⁷ We explained that this policy will be applied on a particularized basis, subject to certain exceptions and, if imposed, any stay would be lifted no later than 90 days following the date that a qualifying request for rehearing may be deemed denied by operation of law.¹⁸

¹⁴ See Order No. 871-B, 175 FERC ¶ 61,098 at PP 8-9 (describing briefs received).

¹⁵ Order No. 871-B, 175 FERC ¶ 61,098 at PP 14, 30.

¹⁶ *Id.* PP 26, 30.

¹⁷ *Id.* PP 43-51.

¹⁸ See *id.* PP 46, 51.

9. On June 3, 2021, INGAA and Enbridge filed requests for clarification and rehearing of Order No. 871-B.¹⁹ On the same day, Mountain Valley filed a request for clarification, or, in the alternative, rehearing.²⁰

II. Discussion

10. INGAA's and Enbridge's petitions include several requests for clarification, or, in the alternative, rehearing of the rule, as revised in Order No. 871-B, and of the Commission's announcement that it would prospectively stay certain section 7(c) certificate orders pending rehearing. Mountain Valley's petition is focused on a single issue regarding the rule's application: whether the rule would apply if rehearing is sought of an amendment order approving a minor mid-construction change that would typically be submitted as a variance request. Below, we first respond to the various requests for clarification or rehearing of the revised rule and then to requests for clarification or rehearing of the Commission's policy of staying section 7(c) certificate orders pending rehearing.

A. Rule Limiting Construction Authorizations Pending Rehearing

1. Opposition to Project Need

11. In Order No. 871-B, the Commission revised § 157.23(b) of its regulations as follows:

With respect to orders issued pursuant to 15 U.S.C. 717b or 15 U.S.C. 717f(c) authorizing the construction of new natural gas transportation, export, or import facilities, no

¹⁹ INGAA's June 3, 2021 Request for Clarification and Rehearing (INGAA Rehearing); Enbridge's June 3, 2021 Request for Clarification and Rehearing (Enbridge Rehearing).

²⁰ Mountain Valley's June 3, 2021 Request for Clarification or, in the Alternative, Rehearing (Mountain Valley Rehearing).

authorization to proceed with construction activities will be issued:

(a) until the time for the filing of a request for rehearing under 15 U.S.C. 717r(a) has expired with no such request being filed, or

(b) if a timely request for rehearing *raising issues reflecting opposition to project construction, operation, or need* is filed, until: (i) *the request is no longer pending before the Commission, (ii) the record of the proceeding is filed with the court of appeals, or (iii) 90 days has passed after the date that the request for rehearing may be deemed to have been denied under 15 U.S.C. 717r(a).*²¹

12. INGAA and Enbridge request that the Commission clarify the meaning of “opposition to project . . . need.” Specifically, INGAA and Enbridge urge the Commission to clarify that this phrase refers only to situations in which a project opponent claims that there is insufficient evidence of *market* need for a project under the NGA section 7 economic balancing test.²² INGAA maintains that “virtually any generic opposition to a project” could be viewed as an argument that the new facilities are not “needed,” and that if not clarified, this phrasing could prohibit the issuance of construction authorization whenever *any* rehearing request is filed by a party generally opposed to development.²³ Similarly, Enbridge posits that parties could delay construction for months by claiming on rehearing that a project is not needed because of “broad climate change concerns.”²⁴

²¹ Order No. 871-B, 175 FERC ¶ 61,098 at P 30 (emphasis in the original reflecting adopted revisions to § 157.23).

²² See INGAA Rehearing at 9; Enbridge Rehearing at 13-14.

²³ INGAA Rehearing at 10, 11.

²⁴ Enbridge Rehearing at 13.

13. We deny INGAA's and Enbridge's requests for clarification on this issue. The petitioners' interpretation construes the language of the rule too narrowly. Adopting this suggestion "would exclude from the rule's purview rehearing requests raising environmental matters or general opposition to a project, as well as rehearing requests filed by members of communities that would be impacted by the construction of new natural gas facilities."²⁵ The Commission has already stated that we did not intend such a result.²⁶ We continue to find it appropriate "to refrain from permitting construction to proceed until the Commission has acted upon any request for rehearing that opposes project construction and operation or raises issues regarding project need, *regardless of the basis* or whether rehearing is sought by an affected landowner."²⁷

2. Amendment Orders Authorizing Mid-Construction Changes

14. INGAA and Mountain Valley seek clarification that the rule does not apply to amendment orders that authorize limited changes while project construction is ongoing, which they refer to as "mid-construction changes," or, in the alternative, rehearing.²⁸ INGAA explains that mid-construction changes—such as construction method changes, temporary workspaces changes, and minor route realignments that do not involve new facilities or new landowners—are traditionally filed by project developers as variance requests.²⁹ However, INGAA notes that the Commission can convert mid-construction

²⁵ Order No. 871-B, 175 FERC ¶ 61,098 at P 15.

²⁶ *Id.*

²⁷ *Id.* (emphasis added).

²⁸ See INGAA Rehearing at 11-20; Mountain Valley Rehearing at 5-9.

²⁹ See INGAA Rehearing at 13-15 (providing examples of prior variance approvals allowing: temporary modification to location of temporary access road to accommodate imminent longwall mining activities in vicinity of construction area, a minor pipeline

changes submitted as a variance request into certificate amendment proceedings. In addition, a project developer may on its own accord decide to seek approval of certain mid-construction changes by filing an amendment application rather than a variance request.³⁰ INGAA and Mountain Valley seek assurance that the rule would not apply to amendment orders authorizing mid-construction changes that would traditionally be approved through the variance process. To support this request, INGAA and Mountain Valley point to the language of § 157.23's introductory text, which references orders authorizing "the construction of new natural gas transportation, export, or import facilities," and explain that the type of mid-construction amendment proceedings for which it seeks clarification do not involve new facilities.³¹

15. If the Commission declines to grant clarification, INGAA and Mountain Valley request rehearing of this issue. If the Commission agrees that the rule does not apply to orders authorizing limited mid-construction changes, INGAA further asks the Commission to clarify that it retains discretion to issue an authorization to proceed with construction during the 30-day rehearing period following such an order.³²

route shift to avoid an obstruction placed on approved pipeline route, modifications to pipeline route and road crossing method due to unanticipated subsurface conditions).

³⁰ *See, e.g.*, Mountain Valley Rehearing at 5 (describing its amendment application submitted in Docket No. CP21-57-000 requesting Commission authorization to change the crossing method for specific wetlands and waterbodies to be crossed by the Mountain Valley Pipeline Project from open-cut crossings to one of several trenchless methods). Nothing in this order prejudices action on the amendment application.

³¹ INGAA Rehearing at 15-16 (noting that the term "facilities" refers to the physical plant approved by the Commission in the original certificate order); Mountain Valley Rehearing at 5.

³² INGAA Rehearing at 18-20.

16. In Order No. 871-B, we explained that the rule limiting construction authorizations would not apply to a request for rehearing of an non-initial order that merely implements the terms, conditions, or provisions of an initial authorizing order, “such as a delegated order issuing a notice to proceed with construction, approving a variance request, or allowing the applicant to place the project, or a portion thereof, in service.”³³ With respect to amendment orders, the Commission stated that the rule would apply only to the facilities approved by the amendment order for which rehearing is sought: it would not relate back to any facilities previously approved by the Commission in the initial authorizing order that remain unchanged by the amendment order.³⁴

17. The Commission has already provided substantial guidance in response to INGAA’s previous requests for clarification regarding the rule’s application to non-initial and amendment orders. The scenario now posed by INGAA and Mountain Valley on rehearing of Order No. 871-B is a slightly different factual scenario. But the Commission is not required to identify and address every conceivable permutation of facts under which questions about the rule’s application may arise.³⁵ Therefore, it is premature to address the possible range of future mid-construction changes. As a general matter, we think it likely that the rule would not apply if rehearing is sought of an amendment order approving a mid-construction change that is generally consistent with the terms and

³³ Order No. 871-B, 175 FERC ¶ 61,098 at P 17.

³⁴ *Id.* P 18.

³⁵ See, e.g., *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 51 (1983) (“It is true that a rulemaking ‘cannot be found wanting simply because the agency failed to include every alternative device and thought conceivable by the mind of man . . . regardless of how uncommon or unknown that alternative may have been[.]’”) (quoting *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978)).

conditions of the original authorization order and does not involve new facilities or new landowners. However, we will consider the circumstances of each request on a case-by-case basis, and will indicate in the Commission's order in each case whether the rule applies.

3. Post-Allegheny Rehearing Treatment

18. Enbridge contends that the Commission erred by determining that an order granting rehearing for further proceedings would vacate the certificate authorization,³⁶ arguing that the Commission cannot revoke certificate authority merely by issuing an interlocutory order granting rehearing or establishing a hearing, briefing schedule, investigation or other similar proceeding, but rather, must make a specific finding on the issues with the requisite support.³⁷ According to Enbridge, an interlocutory order revoking a certificate would improperly place the certificate holder in “legal limbo” as an aggrieved party unable to seek rehearing and appeal of the interlocutory action.³⁸ Enbridge urges the Commission to establish a specific timeframe for issuance of a substantive order following a grant of rehearing subject to further proceedings or to set a deadline after which a construction authorization may issue.³⁹

19. INGAA takes a different tack, suggesting that the Commission adopt a case-by-case approach to determining whether an initial order will be vacated when rehearing is

³⁶ Enbridge Rehearing at 9-10.

³⁷ *Id.* at 9.

³⁸ *Id.* at 10.

³⁹ *Id.* at 10-11.

granted.⁴⁰ Specifically, INGAA asks the Commission to clarify that it did not adopt a blanket rule that a grant of rehearing for further procedures means the entire underlying order is vacated,⁴¹ that it will instead employ a case-by-case approach for determining whether grant of rehearing would result in vacatur,⁴² and that the entire certificate authorization will not be vacated if the Commission seeks additional briefing or information on one or more targeted issues.⁴³

20. Both INGAA and Enbridge note that the Commission’s prior practice of issuing tolling orders did not result in vacatur of underlying order.⁴⁴ Thus, despite changing its procedures for handling requests for rehearing following *Allegheny*, INGAA and Enbridge argue that the Commission has departed from longstanding practice and failed to acknowledge such departure.⁴⁵

21. In response to INGAA’s request, Order No. 871-B posited four post-*Allegheny* scenarios that could arise following the filing of a request for rehearing to explain when such a request would remain pending before the Commission and, thus, preclude the issuance of a construction authorization.⁴⁶ The fourth scenario addressed a situation

⁴⁰ INGAA Rehearing at 20-23.

⁴¹ *See id.* at 20-22.

⁴² *Id.* at 22.

⁴³ *Id.*

⁴⁴ *See* INGAA Rehearing at 23; Enbridge Rehearing at 10.

⁴⁵ *See* INGAA Rehearing at 23 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agencies must “provide reasoned explanation” and show good reasons for a change in position, but “need not demonstrate to a court’s satisfaction that the reasons for the new policy are *better* than the reasons for the old one”) (emphasis in the original)); Enbridge Rehearing at 10 (same).

⁴⁶ *See* Order No. 871-B, 175 FERC ¶ 61,098 at PP 19-29.

contemplated by the *Allegheny* court, where the Commission could “grant rehearing for the express purpose of revisiting and substantively reconsidering a prior decision,” where it “needed additional time to allow for supplemental briefing or further hearing processes.”⁴⁷ In Order No. 871-B, the Commission stated that “[u]nder those circumstances, *i.e.*, where the Commission grants rehearing without issuing a final order, the original authorization would no longer be in effect and the provisions of Order No. 871 would no longer apply since there would be no final order pursuant to which a notice to proceed could be issued.”⁴⁸

22. As an initial matter, Enbridge and INGAA err to the extent that they suggest the Commission determined that original authorization orders necessarily would be vacated or revoked by an interlocutory order granting rehearing for further procedures, as described by the *Allegheny* court. We merely stated, in response to a prior request for clarification from INGAA, that under the specified circumstances contemplated by the *Allegheny* court, the provisions of Order No. 871 “would no longer apply since there would be no final order pursuant to which a notice to proceed could be issued.”⁴⁹ We agree with INGAA that a case-by-case approach is necessary for the Commission to determine the effect that a grant of rehearing for further procedures would have on the underlying authorization. In the order granting rehearing for further procedures, we will indicate the order’s effect on the underlying authorization.

⁴⁷ *Id.* P 27 (citing 964 F.3d at 16).

⁴⁸ *Id.*

⁴⁹ *Id.*

23. The Commission previously declined a request to establish a deadline for issuing a final merits order following a grant of rehearing for further procedures.⁵⁰ As we stated at the time, timelines associated with supplemental briefing or evidentiary submissions may vary based on the complexity of the issues warranting further procedures.⁵¹ Thus, we continue to find that a case-by-case approach is warranted in the event that the Commission grants rehearing because it “need[s] additional time to allow for supplemental briefing or further hearing processes.”⁵²

4. Additional Clarifications to Regulation Text

24. INGAA argues that § 157.23(b) should be revised to add the phrase “the earliest of the time at which,” as italicized below:

if a timely request for rehearing raising issues reflecting opposition to project construction, operation, or need is filed, *until the earliest of the time at which:* (1) the request is no longer pending before the Commission, (2) the record of the proceeding is filed with the court of appeals, or (3) 90 days has passed after the date that the request for rehearing may be deemed to have been denied under 15 U.S.C. 717r(a).⁵³

INGAA contends that this addition would clarify and better reflect what it understands to be the Commission’s intent, as reflected by the Commission’s use of the conjunction “or” and references throughout Order No. 871-B that suggest that the restriction on issuance of construction authorizations will apply until the earliest of the three “triggering events”

⁵⁰ *Id.* P 28.

⁵¹ *Id.*

⁵² *Allegheny*, 964 F.3d at 16.

⁵³ INGAA Rehearing at 24.

contemplated by the rule.⁵⁴ If the suggested change is not adopted, INGAA fears that project opponents may argue that no authorization to proceed with construction should be issued until the occurrence of the later of the three “triggering events” comes to pass.⁵⁵

25. INGAA is correct in its interpretation that a construction authorization may be issued upon the earliest occurrence of the three triggering events enumerated in the regulation. However, we decline to further revise the regulatory language. As currently drafted, the rule uses the conjunction “or” which serves to distinguish the three scenarios as alternatives and signals that a construction authorization may issue once the earliest of the three events occurs.

26. In addition, INGAA renews its request that the Commission revise § 157.23 to expressly state that the rule may be waived for good cause shown.⁵⁶ INGAA urges the Commission to consider cases finding in other contexts that agencies’ authority to waive their own rules is not unlimited and that agencies are bound by, and courts must enforce, the unambiguous terms of regulations.⁵⁷

⁵⁴ *Id.* at 24-25.

⁵⁵ *Id.* at 25.

⁵⁶ *Id.* at 28-29.

⁵⁷ *Id.* at 28 (citing *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986) (finding that FCC failed to follow its rules and regulations in resolving dispute between competing applicants for microwave radio station licenses); *Erie Boulevard Hydropower, LP v. FERC*, 878 F.3d 258, 269 (D.C. Cir. 2017) (stating that “an agency action fails to comply with its regulations, that action may be set aside as arbitrary and capricious” and that “[a]n agency decision that departs from agency precedent without explanation is similarly arbitrary and capricious.”) (citations omitted); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (explaining that when there is “only one reasonable construction of a regulation,” *Auer* deference is not appropriate and a court must not defer to any other reading of the regulation); 5 U.S.C. § 706(2)).

27. The Commission previously declined to adopt INGAA's suggestion to incorporate into the rule an explicit waiver provision, finding it retains authority to waive its own regulations.⁵⁸ INGAA raises no new arguments that cause us to reconsider that decision.

5. Effective Date of Construction Authorization Issuances

28. Enbridge urges the Commission to clarify that its staff may issue authorizations to proceed with construction prior to the deadline established by the rule so long as the authorization *does not become effective until* the occurrence of the earliest of the three triggering events enumerated in the rule (i.e., the rehearing request is no longer pending before the Commission, the record of the proceeding is filed with the court of appeals, or 90 days after the date that the request may be deemed denied).⁵⁹ Allowing project developers to obtain advance confirmation from Commission staff that all preconstruction conditions have been satisfied would, according to Enbridge, help project developers set and meet construction milestones, lessen the chance of additional regulatory delays, and would reflect the Commission's articulated goal of achieving an appropriate balance of interests.⁶⁰

29. The Commission denies the requested clarification. We believe that, in practice, a conditional construction authorization of the nature Enbridge suggests has the potential to create uncertainty for project developers, stakeholders, and Commission staff alike as to the effective date of the authorization, which outweighs the purported benefits that Enbridge identifies. Moreover, the advance notice contemplated by Enbridge fails to

⁵⁸ Order No. 871-B, 175 FERC ¶ 61,098 at P 29.

⁵⁹ Enbridge Rehearing at 11-12.

⁶⁰ *Id.* at 12.

account for a change in status of a project developer's compliance with the terms of its section 7 certificate or section 3 authorization that could arise in the interim. We believe that a cleaner approach is for the Commission to issue authorizations to proceed with construction once all requisite conditions have been satisfied *and* the rule's prohibition on such issuance has elapsed.

6. Procedural Nature of Rule

30. INGAA urges the Commission to reconsider its determination that Order No. 871-B is a procedural rule not subject to the Administrative Procedure Act's (APA) notice and comment procedures.⁶¹ Where a project developer has already fulfilled the necessary prerequisites for beginning construction, INGAA argues that the Commission failed to explain how it has "unfettered discretion" to refuse to allow construction of facilities it has already found required by the public convenience and necessity.⁶² INGAA also characterizes as misleading the "85-day" figure—cited in Order No. 871-B to illustrate that over a five year period, on average, 85 days elapsed between issuance of an initial order and issuance of an authorization to proceed with construction—for it fails to account for project differences and assumes that developers rely on average figures when planning project construction and in-service deadlines.⁶³ According to INGAA, the rule "dramatically changes" the timeline for when a project can be placed in service and "implicate[s] the investment-backed expectations of all project developers."⁶⁴

⁶¹ See INGAA Rehearing at 25-28.

⁶² *Id.* at 26.

⁶³ See *id.* at 26-27; Order No. 871-B, 175 FERC ¶ 61,098 at P 37.

⁶⁴ INGAA Rehearing at 27.

31. The Commission previously responded to concerns that the rule adopted in Order No. 871 was not a procedural rule and thus should have been issued following the APA's notice and comment requirements.⁶⁵ As we explained, the APA's notice and comment procedures were not required because the rule neither substantially "alters the rights or interests" of regulated natural gas companies nor changes the agency's substantive outcomes.⁶⁶ We also explained that the timing of when to permit construction to begin is a matter entirely within the Commission's existing discretion and not a matter of right.⁶⁷ INGAA's arguments on rehearing do not demonstrate an error in the Commission's analysis.⁶⁸

32. Order No. 871 is premised on the Commission's desire to balance its commitment to expeditiously respond to parties' concerns in comprehensive orders on rehearing and the serious concerns posed by the possibility of construction proceeding prior to the completion of agency review.⁶⁹ In Order No. 871-B, we cited the average 85-day span between an initial authorizing order and issuance of a construction authorization only to

⁶⁵ See Order No. 871-B, 175 FERC ¶ 61,098 at PP 35-39.

⁶⁶ *Id.* at P 35 (citing *See Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987)).

⁶⁷ *Id.* (explaining that nothing in the NGA or the Commission's regulations, other than the rule adopted in Order No. 871, addresses the timing of authorizations to commence construction or prevents the Commission from acting on rehearing prior to issuing an authorization to proceed with construction).

⁶⁸ See, e.g., *Batterton v. Marshall*, 648 F.2d 694, 707 (D.C. Cir. 1980) ("A useful articulation of the [rule of agency organization, procedure, or practice] exemption's critical feature is that it covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.").

⁶⁹ Order No. 871, 171 FERC ¶ 61,201 at P 11.

illustrate that in many cases construction cannot begin immediately upon issuance of an order authorizing new facilities under NGA sections 3 or 7.⁷⁰

B. Policy of Presumptively Staying Section 7(c) Certificate Orders

33. In Order No. 871-B, the Commission announced a new policy of presumptively staying an NGA section 7(c) certificate order during the 30-day period for seeking rehearing and pending Commission resolution of any timely requests for rehearing filed by a landowner, until the earlier of the date on which the Commission (1) issues a substantive order on rehearing or otherwise indicates that the Commission will not take further action, or (2) 90 days following the date that a request for rehearing may be deemed to have been denied under NGA section 19(a). We explained that this policy will not apply where the pipeline developer has, at the time of the certificate order, already acquired all necessary property interests or where no landowner protested the section 7 application. In addition, we explained that the stay will automatically lift following the close of the 30-day period for seeking rehearing if no landowner files a timely request for rehearing of the certificate order. As we explained, this policy balances the competing interests at stake, including the project developer's interest in proceeding with construction when it has obtained all necessary permits, and a project opponent's interest in being able to challenge the Commission's ultimate decision in a timely manner.

1. Policy Does Not Violate NGA or APA

34. INGAA and Enbridge argue that the stay policy is unlawful, under the NGA and the APA, because it seeks to achieve an objective—conditioning a certificate holder's

⁷⁰ See Order No. 871-B, 175 FERC ¶ 61,098 at P 37.

eminent domain authority—that is directly prohibited by statute through indirect means.⁷¹ INGAA and Enbridge contend that because the Commission has no authority to deny or restrict certificate holders from exercising the power of eminent domain, the Commission’s new policy of presumptively staying its section 7 certificate orders is an unlawful workaround of a statutory prohibition and improperly limits a certificate holder’s statutorily conferred eminent domain authority.⁷²

35. INGAA and Enbridge further contend that the stay policy violates section 19(c) of the NGA, which states that the filing of a rehearing request “shall not, unless *specifically ordered by the Commission*, operate as a stay of the Commission’s order.”⁷³ INGAA maintains that the Commission, by announcing in Order No. 871-B a general policy of presumptively staying certificate orders pending rehearing, acted in general, rather than with the specificity that NGA section 19(c) demands.⁷⁴ INGAA further asserts that the policy is unlawful because it will result in the Commission staying its orders before either a rehearing request has been filed or a stay has been sought, an outcome not contemplated by the NGA.⁷⁵ Finally, INGAA takes issue with the Commission’s position that its authority to stay a certificate order is found in the APA, arguing that section 705 of that

⁷¹ INGAA Rehearing at 29-31; Enbridge Rehearing at 19-21.

⁷² See INGAA Rehearing at 29-30 (citing *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 328 (1961); *Cont’l Air Lines, Inc. v. CAB*, 522 F.2d 107, 115 (D.C. Cir. 1974)); Enbridge Rehearing at 19-21.

⁷³ INGAA Rehearing at 31 (quoting 15 U.S.C. 717r(c)); see Enbridge Rehearing at 16-19.

⁷⁴ INGAA Rehearing at 31. INGAA notes that the word specific means “[o]f, relating to, or designating a particular . . . thing” and that if the Commission wants to grant a stay, it must do so based on the particular facts of a particular case. *Id.* at 32.

⁷⁵ *Id.*

act authorizes the Commission to postpone the effective date of its actions only “pending judicial review,” and that this authority is inapplicable prior to the filing of a request for rehearing and while such request is pending before the Commission.⁷⁶

36. As explained in Order No. 871-B, NGA section 16 gives the Commission an independent basis for granting stays of a certificate order.⁷⁷ Specifically, section 16 provides that “[t]he Commission shall have the power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this [Act].”⁷⁸ Section 16 also mandates that Commission orders “shall be effective on the date and in the manner which the Commission shall prescribe.”⁷⁹ Thus, the NGA provides the Commission with broad authority to take actions necessary to carry out the act, and we find that, given the significant consequences that eminent domain has for landowners, issuance of a stay of a certificate order under certain narrowly prescribed circumstances is well within this authority. Because NGA section 16 is broadly applicable, the Commission utilizes the

⁷⁶ *Id.* at 33 (citing 5 U.S.C. 705).

⁷⁷ 15 U.S.C. 717o; *see Pub. Util. Dist. No. 1 of Okanogan Cty., Wash.*, 162 FERC ¶ 61,040, at P 13 (2018) (*Okanogan PUD*) (addressing analogous provision of the Federal Power Act (FPA)) (citing 16 U.S.C. 825h; *Kings River Conservation Dist.*, 30 FERC ¶ 61,151, at 61,320 (1985) (“The Commission’s authority to issue a stay of a license order is derived primarily from Section 309 of the [FPA]”); *Keating v. FERC*, 569 F.3d 427, 429 (D.C. Cir. 2009) (noting that FERC has stayed the commencement of construction deadline pursuant to section 309 of the FPA)). The courts have held that the NGA and FPA should be interpreted consistently. *See Env’tl Action v. FERC*, 996 F.2d 401, 410 (D.C. Cir. 1993); *Tenn. Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988); *see also Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

⁷⁸ 15 U.S.C. 717o.

⁷⁹ *Id.*

standard set forth in APA section 705 to determine whether a stay is justified.⁸⁰ But the Commission’s underlying authority derives from NGA section 16.

37. In any event, we disagree with INGAA’s argument that APA section 705, which authorizes an agency to postpone the effective date of its actions “pending judicial review,”⁸¹ means that a stay issued pursuant to this authority must be connected to ongoing judicial review proceedings and is thus inapplicable to any proceedings before the Commission that precede judicial review (e.g., the time for filing and considering requests for rehearing).⁸² INGAA construes the statute too narrowly. The clause “pending judicial review” in section 705 could reasonably be construed as “in anticipation of” in which case all that is required is that the Commission reasonably anticipate—because rehearing has been sought or a proposal has been strongly protested—that a party will seek judicial review.

⁸⁰ Under the APA, an agency may issue a stay of its order where the “agency finds that justice so requires.” 5 U.S.C. 705. In determining whether this standard has been met, we consider several factors, including: (1) whether a stay is necessary to prevent irreparable injury; (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest. *See, e.g., Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022, at P 13 (2012); *Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,103, at P 17 (2011). *But see Okanogan PUD*, 162 FERC ¶ 61,040 at P 13, n.21 (explaining, in the hydroelectric licensing context, that “[p]reviously, the Commission has applied different standards than the one set forth in section 705 of the APA.”) (citing *Monongahela Power Co.*, 7 FERC ¶ 61,054 (1979) (“we considered [the motions for stay] under the standards of *Virginia Jobbers Association v. FPC*, 259 F.2d 291 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977)”); *Nantahala Power & Light Co.*, 20 FERC ¶ 61,026 (1982) (“finding that a stay pending rehearing is in the ‘public interest’”); *Kings River Conservation Dist.*, 27 FERC ¶ 61,098 (1984) (“[i]t is appropriate and in the public interest to stay the license issued in Project No. 2890 until completion of judicial review.”)).

⁸¹ 5 U.S.C. 705.

⁸² *See* INGAA Rehearing at 33. Indeed, a request for rehearing does not simply precede, but is a mandatory prerequisite to, judicial review. 15 U.S.C. 717r(b).

38. Further, in Order No. 871-B, the Commission announced only a general policy with respect to stays.⁸³ Accordingly, although contained in a final rule, the Commission's discussion of that general policy did nothing more than explain how the Commission intends to approach a particular set of questions in the future without conclusively resolving those questions or otherwise fixing any rights or responsibilities.⁸⁴ Indeed, as explained in Order No. 871-B, the Commission intends to make a particularized application of the policy in individual certificate orders and parties to those individual proceedings will have the opportunity to challenge the Commission's determination on whether to issue a stay in those proceedings. Notably, the Commission has issued five certificate orders since adopting the policy reflected in Order No. 871-B,

⁸³ General statements of policy are not be subject to pre-enforcement judicial review. *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (citing *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 809-11 (2003)).

⁸⁴ See, e.g., *INGAA v. FERC*, 285 F.3d 18, 59-61 (D.C. Cir. 2002) (finding Commission's discussion of seasonal rates within a final rule "represents only a policy statement and therefore is neither binding on any party nor ripe for judicial review"); *Am. Gas Ass'n v. FERC*, 888 F.2d 136, 151-52 (D.C. Cir. 1989) (finding challenges to substantive aspects of Commission's cost recovery policy statement not ripe for review); *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 35 (D.C. Cir. 1974) (finding Order No. 467, a policy proposal on delivery priorities by natural gas companies during curtailment periods, to be a general statement of policy that was not reviewable under NGA section 19(b) because it lacked "sufficiently immediate and significant impact upon petitioners"). That is consistent with the Commission's long-standing approach of articulating its policies with respect to NGA section 7 certificate applications, while leaving all actual findings and determinations for future proceedings. See, e.g., *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, corrected, 89 FERC ¶ 61,040 (1999), clarified, 90 FERC ¶ 61,128, further clarified, 92 FERC ¶ 61,094, at 61,375 (2000) (explaining that the purpose of the Certificate Policy Statement is "to provide the natural gas industry with guidance by stating the analytical framework the Commission will use to evaluate proposals for certificating new construction" and that "generally objections to such a statement are not directly reviewable. Rather, such review must await implementation of the policy in a specific case."). In line with that interpretation, the discussion in Order No. 871-B regarding how the Commission will approach those future cases was not accompanied by any revisions to the Commission's rules or regulations.

with none of those orders containing a stay along the lines contemplated in Order No. 871-B.⁸⁵

39. Contrary to INGAA’s and Enbridge’s assertions, nothing in NGA section 19(c), which on its face contemplates that the Commission may stay its own orders, precludes the Commission from determining that a stay of an individual certificate order during the 30-day period for seeking rehearing. Section 19(c) provides that a request for rehearing does not automatically stay a Commission order.⁸⁶ That section does not speak to, or otherwise limit, the Commission’s authority to issue a stay of its own accord. As described above, NGA section 16 provides the Commission with broad authority to issue a stay where warranted by the facts and circumstances in a particular proceeding.

2. Qualifying Landowner Rehearing Requests

40. Enbridge seeks clarification that, for the purpose of the policy, the term “landowner” means “directly affected” landowner, as defined by the Commission’s regulations, or, in the alternative, rehearing.⁸⁷ This clarification, Enbridge maintains, would align with the Commission’s justification for the policy as it would ensure that a stay is applied only when a “protest or request for rehearing is submitted by the owner of property that would be subject to an eminent domain proceeding (i.e., to directly affected

⁸⁵ See *Tuscarora Gas Transmission Co.*, 175 FERC ¶ 61,147 (2021); *N. Natural Gas Co.*, 175 FERC ¶ 61,146 (2021); *Enable Gas Transmission, LLC*, 175 FERC ¶ 61,183 (2021); *WBI Energy Transmission, Inc.*, 175 FERC ¶ 61,182 (2021); *N. Natural Gas Co.*, 175 FERC ¶ 61,238 (2021). There were no landowner protests in any of these cases.

⁸⁶ See 15 U.S.C. 717r(c) (“The filing of an application for rehearing . . . shall not, unless specifically ordered by the Commission, operate as a stay of the Commission’s order.”).

⁸⁷ Enbridge Rehearing at 14-16 (citing 18 CFR 157.6(d)(2)(i) (2020)).

landowners), and not owners of property that merely abuts the construction right-of-way or falls within a certain radius of compressor station construction or storage facilities.”⁸⁸

41. As a general matter, we agree with Enbridge’s suggestion that the policy is intended to protect those whose property would be crossed or used by the proposed pipeline project as these are the landowners whose property rights could be acquired by the eminent domain authority that NGA section 7(h) confers upon certificate holders.⁸⁹ Should the issue of a landowner’s specific property interests arise in a proceeding, the Commission will consider it.

3. Commitment to Refrain from Exercise of Eminent Domain

42. Enbridge seeks clarification that the Commission will promptly lift a stay following a certificate holder’s commitment that it will not exercise its right of eminent domain “for any reason other than to obtain the access necessary to complete surveys” while a qualifying landowner rehearing request is pending,⁹⁰ or, in the alternative, rehearing.

43. In Order No. 871-B, the Commission explained that a developer may file a motion seeking “to preclude, or lift, a stay based on a showing of significant hardship,” and expressly stated “that a commitment by the pipeline developer not to begin eminent domain proceedings until the Commission issues a final order on any landowner

⁸⁸ *Id.* at 15 (citing 18 CFR 157.6(d)(2)(i)).

⁸⁹ *See* 15 U.S.C 717f(h) (authorizing certificate holders to acquire by eminent domain “the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines”); *see also* 18 CFR 157.6(d)(2)(i) (defining directly affected landowners).

⁹⁰ Enbridge Rehearing at 21-23.

rehearing requests will weigh in favor of granting such a motion.”⁹¹ We reiterate that conclusion, but will not pre-judge the merits of any motion along the lines contemplated in Order No. 871-B. As with the other aspects of this policy, those determinations will be made in any future proceeding.

4. Claims of Burden Shifting

44. INGAA argues that the Commission unlawfully shifted to pipeline developers the burden of proof to show that a stay is not warranted and argues that such a change in policy can only be accomplished through notice and comment rulemaking.⁹² INGAA contends that the Commission failed to provide justification for its departure from past practice and failed to explain why it is permissible to shift this burden.⁹³ Enbridge makes a similar argument, but takes it a step further arguing that the Commission failed to “assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.”⁹⁴ INGAA requests further clarification regarding how the Commission will determine when a stay should be issued and how specifically a developer can overcome the presumption that a stay will be granted.⁹⁵

45. In Order No. 871-B, the Commission acknowledged that the stay policy is a departure from past practice and explained its belief that “this new policy better balances

⁹¹ Order No. 871-B, 175 FERC ¶ 61,098 at P 51.

⁹² See INGAA Rehearing at 33-35.

⁹³ *Id.* at 33-34.

⁹⁴ Enbridge Rehearing at 18-19.

⁹⁵ INGAA Rehearing at 34-35.

the relevant considerations—such as fairness, due process, and developer certainty—thereby justifying the change in policy.”⁹⁶ We disagree with the petitioners that this policy improperly shifts the burden to pipeline developers. As we previously explained, the Commission will determine whether to impose a stay based on the circumstances presented in each particular certificate proceeding—the burden is not on the pipeline. Rather, the Commission is obligated to ensure that all of its decisions, including whether to impose a stay in individual certificate proceedings, are supported by the record and reasonably explained.⁹⁷ And parties to those individual proceedings will have the opportunity to provide input to and challenge the Commission’s decision to issue a stay, or not, in those proceedings.

46. We further disagree with INGAA’s assertion that public notice and comment was required prior to the Commission announcing the stay policy. General statements of policy, such as the one announced in Order No. 871-B, are exempted from the APA’s notice and comment procedures.⁹⁸

5. Consideration of Industry Concerns

47. INGAA contends that the Commission both failed to sufficiently appreciate the harm that will befall the natural gas industry and to explain what activities certificate holders can perform while a stay is in place.⁹⁹ INGAA points to the length of this proceeding to cast doubt on the Commission’s statement that it has increased the speed

⁹⁶ Order No. 871-B, 175 FERC ¶ 61,098 at P 49, n.101.

⁹⁷ See 15 U.S.C. 717r(b); 5 U.S.C. 706.

⁹⁸ 5 U.S.C. 553(b)(A).

⁹⁹ See INGAA Rehearing at 35-39.

with which it resolves rehearing requests.¹⁰⁰ It also seeks further clarity regarding the types of activities that certificate holders may undertake while a stay is in place.

48. The Commission fully considered industry concerns and ultimately concluded that the stay policy announced in Order No. 871-B struck an appropriate balance between the interests of pipeline developers and landowners.¹⁰¹ The rehearing process in this rulemaking proceeding, involving generally applicable policy considerations, is not representative of the increased speed with which the Commission handles project-specific rehearing requests in the post-*Allegheny* era. In fact, the Commission continues to strive to act on landowner rehearing requests (the subset of rehearing requests that may result in a stay extending beyond the 30-day period for seeking rehearing) within 30 days. The petitioners do not cite an instance of a delay in the Commission's issuance of an order on rehearing of a certificate order. While a stay is intact, certificate holders can engage only in those development activities that they were free to undertake prior to receiving a certificate order, such as negotiating easement agreements with landowners and conducting environmental surveys on private property they have permission to access.

6. Landowner Ability to Seek Judicial Stay

49. Finally, INGAA asserts that the Commission failed to explain why the policy is necessary in light of an aggrieved party's ability to seek a stay from a reviewing court after a request for rehearing is deemed denied.¹⁰²

¹⁰⁰ *Id.* at 36.

¹⁰¹ See Order No. 871-B, 175 FERC ¶ 61,098 at PP 48-51.

¹⁰² INGAA Rehearing at 39.

50. As the Commission explained in Order No. 871-B, certificate holders can, and routinely do, initiate condemnation proceedings immediately upon receipt of a certificate order.¹⁰³ Absent a stay in a particular proceeding, certificate holders have the ability to initiate condemnation actions against landowners prior to the expiration of the 30-day period for seeking rehearing, and prior to the 30-day period for the Commission to act on such a request before it may be deemed denied. This leaves a gap of approximately 60 days preceding a deemed denial and during which time landowners could be susceptible to condemnation proceedings being initiated prior to a reviewing court obtaining concurrent jurisdiction following the filing of a petition for review.¹⁰⁴ As we explained at length in Order No. 871-B, this Commission finds the fundamental unfairness that could result from that outcome untenable. Further, the stay policy is an appropriate exercise of our authority, and there is no need to leave these matters solely to the courts.

C. Commission Determination

51. In response to INGAA's, Enbridge's, and Mountain Valley's requests for rehearing, Order No. 871-B is hereby modified and the result sustained, as discussed in the body of this order.

III. Document Availability

52. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the

¹⁰³ See, e.g., *Allegheny*, 964 F.3d at 6.

¹⁰⁴ See, e.g., *Env'tl. Def. Fund v. FERC*, No. 20-1016, *et al.*, 2021 WL 2546672, at *8, *15 (D.C. Cir. June 22, 2021) (citing to relevant pipeline's use of eminent domain in support of court's decision to vacate certificate order).

contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

53. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits in the docket number field.

54. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

IV. Dates

55. The effective date of the document published on May 13, 2021 (86 FR 26,150), is confirmed: June 14, 2021.

By the Commission. Commissioner Chatterjee is not participating.

Commissioner Danly is dissenting with a separate statement attached.

Issued: August 2, 2021

Debbie-Anne A. Reese,
Deputy Secretary.

DEPARTMENT OF ENERGY
FEDERAL ENERGY REGULATORY COMMISSION

Limiting Authorizations to Proceed with Construction
Activities Pending Rehearing

DANLY, Commissioner, *dissenting*:

1. I dissent in full from today's order affirming the majority's modification and expansion of Order No. 871.¹ As I stated in my dissent in Order No. 871-B, I would repeal the rule as it is no longer required by law or prudence.² I write separately today to further explain how the Commission's new, unnecessary, and unjustifiable presumption to stay certificate orders conflicts with the plain text of the Natural Gas Act (NGA) and is beyond the Commission's authority.³ I also write to explain how the majority's presumptive stay is not based on reasoned decision making and therefore runs afoul of the Administrative Procedure Act (APA).

I. The Presumptive Stay is Beyond the Commission's Authority and Contrary to the Plain Text of the Natural Gas Act

2. In today's order, the majority states "the Commission's underlying authority derives from NGA section 16."⁴ Specifically, the majority relies on the provisions providing the Commission authority "to perform any and all acts . . . necessary or appropriate to carry out the provisions of this [Act]" and to determine the effective date of its orders.⁵ Like many before it, the majority has turned to NGA section 16 when all else has failed, placing more weight upon this section than it can reasonably bear. NGA section 16 "do[es] not confer independent authority to act."⁶ It is "of an implementary rather than substantive character" and "can only be implemented 'consistently with the provisions and purposes of the legislation.'"⁷ The majority, however, fails to confront

¹ See *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 176 FERC ¶ 61,062 (2021) (Order No. 871-C).

² See *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 175 FERC ¶ 61,098 (2021) (Danly, Comm'r, dissenting at P 2) (Order No. 871-B).

³ See *id.* (Danly, Comm'r, dissenting at PP 3, 6-14).

⁴ Order No. 871-C, 176 FERC ¶ 61,062 at P 36.

⁵ *Id.* (quoting 15 U.S.C. § 717o).

⁶ *New England Power Co. v. Fed. Power Comm'n*, 467 F.2d 425, 431 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974).

⁷ *Id.* at 430 (citation omitted).

this limitation on section 16's reach and employs this provision in a manner that contravenes the NGA in three respects.

3. *First*, the majority's policy denies pipelines holding certificates the ability to exercise eminent domain for up to 150 days—doing exactly what the majority explicitly concedes it cannot do: “restrict the power of eminent domain in a section 7 certificate.”⁸ NGA section 7(h) authorizes “*any holder of a certificate*” to exercise eminent domain authority.⁹ Other than the issuance of a certificate, Congress ordained no other condition be met in advance of a pipeline pursuing eminent domain. The Commission can only employ NGA section 16 in a manner consistent with the other provisions of the act. Here, the use of section 16 is in direct conflict with the statute—and the majority does not see fit to argue otherwise.

4. *Second*, presumptively staying a pipeline's ability to pursue eminent domain is not appropriate under section 16 because such a delay is not a “necessary or appropriate” adjunct to the Commission's effectuation of its responsibilities under section 7 of the NGA. That section requires the Commission to issue certificates to applicants whose proposed natural gas facilities are found to be in the public convenience and necessity. The timing of a pipeline's use of eminent domain does not weigh into the Commission's determination of whether proposed pipeline facilities are in the public convenience and necessity. If it did, the majority would rely on the Commission's authority under NGA section 7(e) to “attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require.”¹⁰ The majority, however, does not.¹¹ Nor does the majority cite any other provision of the NGA for which the Commission's action would be “necessary or appropriate” under section 16.

5. *Third*, the only reasonable reading of NGA section 7 leads to the conclusion that Congress intended for certificates to be effective upon issuance and acceptance, and for the right to exercise eminent domain to attach thereupon. NGA section 7(e) provides, “a certificate *shall be issued*” so long as the applicant is “able and *willing* properly to do the acts”¹² Further, NGA section 7(h) authorizes “*any holder of a certificate of public convenience and necessity*” to acquire by eminent domain the land necessary for the

⁸ Order No. 871-B, 175 FERC ¶ 61,098 at P 45 (citation omitted). Indeed, Order No. 871-B quotes the *Berkley v. Mountain Valley Pipeline, LLC*, as stating, “FERC does not have discretion to *withhold* eminent domain once it grants a Certificate.” *Id.* P 45 n.86 (quoting *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018)) (emphasis added).

⁹ 15 U.S.C. § 717f(h) (emphasis added).

¹⁰ 15 U.S.C. § 717f(e).

¹¹ See Order No. 871-B, 175 FERC ¶ 61,098 at P 45 (“In other words, the Commission lacks the authority to deny or restrict the power of eminent domain in a section 7 certificate.”) (citation omitted).

¹² 15 U.S.C. § 717f(e) (emphasis added).

construction, operation, and maintenance of its pipeline facilities.¹³ Black’s Law Dictionary defines “holder” as “[a] person with legal possession of a document of title or an investment security,” meaning that the title was issued and accepted by that person.¹⁴ This view has been shared by the courts¹⁵ and the Commission.¹⁶ This is not to say that the Commission can never make a certificate effective after its issuance or stay a certificate order. Both may be warranted in certain instances. In my view, however, it is contrary to the purpose of the NGA to adopt a policy that presumptively stays certificates for the avowed purpose of delaying a pipeline’s Congressionally-authorized entitlement to exercise eminent domain.¹⁷

6. In addition to NGA section 16, the majority appears to place some reliance on APA section 705, which provides “[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.”¹⁸ I presume this is the case because the majority responds to arguments raised by the Interstate Natural Gas Association of America (INGAA) that the phrase “pending judicial review” in APA section 705 means an agency stay must be “tied to litigation.”¹⁹ The majority

¹³ *Id.* § 717f(h) (emphasis added).

¹⁴ *Holder*, Black’s Law Dictionary (11th ed. 2019).

¹⁵ See *Maritimes & Ne. Pipeline, L.L.C. v. Decoulos*, 146 F. App’x 495, 498 (1st Cir. 2005) (“Once a CPCN is issued by the FERC, and the gas company is unable to acquire the needed land by contract or agreement with the owner, the only issue before the district court in the ensuing eminent domain proceeding is the amount to be paid to the property owner as just compensation for the taking.”) (emphasis added); *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 818 (4th Cir. 2004) (“Once FERC has issued a certificate, the NGA empowers the certificate holder to exercise ‘the right of eminent domain’ over any lands needed for the project.”) (emphasis added); *Bohon v. FERC*, No. 20-6 (JEB), slip op. at 2 (D.D.C. May 6, 2020) (“FERC’s issuance of a certificate, moreover, conveys the power of eminent domain to its holder.”) (emphasis added); *Paul H. Stitt & Loretta Stitt*, 39 F.P.C. 323, 324 (1968) (“While the condemnation powers granted to certificate holders by Section 7(h) of the Natural Gas Act operate prospectively from the date of issuance of a certificate”) (emphasis added).

¹⁶ See 18 C.F.R. § 157.20(a) (2020) (“The certificate shall be void and without force or effect unless accepted in writing by applicant . . .”).

¹⁷ This is and separate apart from the argument that I raised in my earlier dissent that NGA section 19(c), while allowing for stays, requires a specific order by the Commission. Order No. 871-B, 175 FERC ¶ 61,098 (Danly, Comm’r, dissenting at PP 8-10; see also 15 U.S.C. § 717r(c) (“The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission’s order.”). Clearly, an automatically-applied presumption is not a specific order and thus violates the unambiguous terms of the statute.

¹⁸ 5 U.S.C. § 705.

¹⁹ Order No. 871-C, 176 FERC ¶ 61, 61,062 at P 37, n.82 (citing INGAA

asserts that a more reasonable interpretation of the phrase “pending judicial review” is “in anticipation of [judicial review].”²⁰ I’ve found no court that supports that position and multiple courts, in fact, disagree.²¹

Rehearing at 33).

²⁰ *Id.* P 37.

²¹ *Nat. Res. Def. Council v. U.S. Dep’t of Energy*, 362 F. Supp. 3d 126, 150 (S.D.N.Y. 2019) (“A stay is supposed to be grounded on ‘the existence or consequences of the pending litigation.’”); *Bauer v. DeVos*, 325 F. Supp. 3d 74, 106 (D.D.C. 2018) (“Most significantly, the relevant equitable considerations are not free-floating but, rather, must be tied to the underlying litigation. Section 705 expressly provides that an agency may ‘postpone the effective date of [agency] action . . . *pending judicial review.*’”) (emphasis in original); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 34 (D.D.C. 2012) (“Where, as in this case, [an agency] seeks to justify a stay of its rules ‘pending judicial review,’ the agency must have articulated, at a minimum, a rational connection between its stay and the underlying litigation in the court of appeals.”).

II. Presumptive Stay is Not Based on Reasoned Decision Making

7. To the extent the majority merely argues that it can apply the three factors of the equitable standard set forth in APA section 705 to determine whether a stay is warranted, I agree. However, the majority's application of the equitable standard is not based on reasoned decision making, and thus violates the APA.²²

8. As I stated in my dissent to Order No. 871-B, the majority's assumption that the mere existence of a "landowner protest" automatically means a stay is required in the interest of justice is—at best—questionable.²³ This represents a broad category of litigant, whose mere participation in a proceeding would temporarily extinguish a certificate holder's Congressionally-established rights. Surely, the Commission should at least impose rational limits on the rule they are establishing. For example, will the Commission stay a certificate where there is a protest by a landowner with property interests that abut the proposed right-of-way but are not subject to condemnation? And the Commission's policy applies to where there is a "landowner *protest*." Will the Commission apply the stay where a landowner protested but did not intervene and thus cannot seek rehearing or judicial review? What about in the case where the landowner joined a protest, but may not have active interests in the proceeding?

9. The majority also fails to consider the second factor "whether issuing a stay may substantially harm other parties." Will the Commission stay a certificate where the proposed project is delivering natural gas to municipalities that need the gas within six months of certificate issuance? Will the Commission stay a certificate if the delay caused by its stay would cause an additional year's delay in construction because of seasonal restrictions? To what degree will the financial consequences for the project proponent be considered? What about the consequences to the pipeline's customers? It is not inconceivable that those projects whose applications have been pending for more than a year ultimately will be canceled as a result of delay.²⁴ How can the potential cancellation of a project that has been determined by the Commission to be in the public interest itself

²² *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983). See also *Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1513-14 (D.C. Cir. 1984) ("We defer to the agency's expertise . . . so long as its decision is supported by 'substantial evidence' in the record and reached by 'reasoned decision-making,' including an examination of the relevant data and a reasoned explanation supported by a stated connection between the facts found and the choice made.") (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *Memphis Light, Gas & Water Div. v. FPC*, 504 F.2d 225, 230 (D.C. Cir. 1974); 16 U.S.C. § 825l (1982)).

²³ Order No. 871-B, 175 FERC ¶ 61,098 (Danly, Comm'r, dissenting at P 8).

²⁴ See *id.* (Danly, Comm'r, dissenting at P 14) (noting Dominion Energy Transmission, Inc. withdrew its application for a certificate for its Sweden Valley Project that it had filed seventeen months prior).

be in the public interest or, under the second factor, be found not to “substantially harm other parties”?

III. Conclusion

10. The power of eminent domain is surely profound and formidable. I cannot fault my colleagues for the anxiety they have expressed regarding its wise and just exercise. However, the Commission, as a mere “creature of statute,” can only act pursuant to law by which Congress has delegated its authority.²⁵ Congress conferred the right to certificate holders to pursue eminent domain in federal district court or state court,²⁶ having recognized that states “defeat[] the very objectives of the Natural Gas Act”²⁷ by conditioning or withholding the exercise of eminent domain. Congress has made that determination. It has codified it into law. The Commission, as an executive agency, is empowered only to implement Congressional mandate, not to second-guess Congressional wisdom or attempt to do indirectly what it cannot directly.²⁸

11. Despite this, I doubt that the Commission’s arguments will be presented to the courts. It will be challenging for those that are harmed by the issuance of a generally-applicable policy to show aggrievement before it is actually applied in a case. And by the time those harmed are able seek review, the damage of the stay will have been done and the stay will have been lifted. My pessimistic outlook is that despite this order’s obvious infirmities, the Commission will avoid judicial scrutiny and thereby thwart the intent of Congress.

For these reasons, I respectfully dissent.

James P. Danly
Commissioner

²⁵ *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (“As a federal agency, FERC is a ‘creature of statute,’ having ‘no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.’”) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)) (emphasis in original); see *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”).

²⁶ See 15 U.S.C. § 717f(h).

²⁷ S. Rep. No. 80-429, at 3 (1947).

²⁸ *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978) (“What the Commission is prohibited from doing directly it may not achieve by indirection.”).

